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No. 76-861

In the Supreme Court of the United States

OCTOBER TERM, 1976

M. RALPH CANNON, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner seeks review of the decision in this income tax case that he had $32,340 of unreported income from wagering. The court of appeals held that the Tax Court correctly rejected petitioner's testimony as vague and unreliable.

The pertinent facts are as follows: During October and November, 1967, Joe H. Hodges of Houston, Texas, wired $64,680 to Idus P. Ash in Dallas, Texas, with the understanding that Ash, as agent for Hodges, would place bets on Hodges' behalf with a bookmaker in Dallas (Pet. App. B 18-19). It is undisputed that Hodges lost the entire $64,680. However, it is not clear who won it, petitioner or Ash. Although Ash claimed that he used the money to place bets with petitioner, petitioner asserted that he received only $11,000 to $12,000 (Pet. App. C

25). Neither petitioner nor Ash retained any records of the cash received or paid out in connection with their gambling activities (Pet. App. B 22).

In order to protect the revenue, the Commissioner determined deficiencies against petitioner and Ash for the entire $64,680 of unreported wagering income, and both petitioner and Ash petitioned the Tax Court for a redetermination of their respective deficiencies. Since neither petitioner nor Ash kept records of the wagers and the testimony of each was vague, the Tax Court concluded that neither of them proved how much income he had earned from the gambling activities involving Hodges' money. The Tax Court therefore divided the $64,680 of gambling income evenly between petitioner and Ash (Pet. App. B 16-24). The court of appeals affirmed, with one judge dissenting (Pet. App. C 25-29).[1]

Petitioner first argues (Pet. 11) that the Commissioner's alternative notice of deficiency was arbitrary. But where income may be attributable to more than one taxpayer, it is the settled and approved practice of the Commissioner to issue alternative notices of deficiency in order to protect the revenue. See, *e.g.*, *Commissioner* v. *Southwest Expl. Co.*, 350 U.S. 308; *Estate of Goodall* v. *Commissioner*, 391 F. 2d 775, 782 (C.A. 8), certiorari denied *sub nom. Good-All Electric Mfg. Co.* v. *Commissioner*, 393 U.S. 829; *Wiles* v. *Commissioner*, 499 F. 2d 255, 259 (C.A. 10), certiorari denied, 419 U.S. 996. In so doing, the government does not seek to collect the same tax more than once. To the contrary, the procedure of alternative determinations is adopted to insure that the tax will be collected at least once, when the questions of

[1]The dissenting judge would have allocated $12,000 to petitioner and $52,680 to Ash (Pet. App. C 29).

its amount and the proper taxpayer have been finally determined.

Here, the Commissioner's alternative positions with respect to the unreported wagering income of petitioner and of Ash were each predicated upon the rational factual basis that either of them might have earned the wagering income in question. The Commissioner was simply seeking consistent tax treatment in accordance with the facts surrounding the wagering activity.

2. Petitioner further argues (Pet. 12-13) that there is no evidence to support the Tax Court's determination taxing one-half of the $64,680 to himself and one-half to Ash. In support of this assertion, petitioner relies upon his testimony that he received only $11,000 or $12,000. But the Tax Court was free to disregard petitioner's testimony as improbable. Since neither petitioner nor Ash carried their burden of proving the incorrectness of the Commissioner's determination (*Helvering* v. *Taylor*, 293 U.S. 507, 515), the Commissioner's deficiencies against both of them stand unchallenged. Given the fact that the Commissioner seeks to tax the $64,680 only once, petitioner can hardly complain against the Tax Court's even division of that sum between Ash and himself.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

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[2]*Greenfeld* v. *Commissioner*, 165 F. 2d 318 (C.A. 4), upon which petitioner relies (Pet. 12), does not conflict with the decision below. That case did not involve alternative deficiencies against two taxpayers. Indeed, the court there noted that a trial court was free to disregard improbable testimony of a witness, even in the absence of direct conflicting testimony (*id.* at 319).

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